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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1816

PAUL LABRIOLA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Paul Labriola seeks a writ of certiorari to review an order of the New York State Appellate Division, First Department, entered February 26, 1976. *People* v. *Labriola*, 51 A.D.2d 713 (1st Dept. 1976). By this order, the Appellate Division affirmed, without opinion, petitioner's December 9, 1974 conviction upon his plea of guilty, rendered in the Supreme Court of New York County, for two counts of FORGERY IN THE FIRST DEGREE (New York Penal Law §170.15). Petitioner was sentenced to concurrent, indeter-

minate seven-year terms* and is presently incarcerated. On March 18, 1976, the Hon. SOL WACHTLER denied an application for leave to appeal to the New York State Court of Appeals.

On March 4, 1976, the United States Court of Appeals for the Second Circuit (MOORE, FRIENDLY, OAKES, JJ.) affirmed petitioner's federal convictions for conspiracy to forge and utter United States savings bonds stolen from the mails, and forgery of United States savings bonds. In its opinion, the Second Circuit upheld the legality of the same wiretap orders which are challenged in the instant petition. *United States* v. *Principie,* 531 F. 2d 1132 (2d Cir. 1976). Labriola's petition for a writ of certiorari in that case is presently before this Court (No. 75-1394).

Introduction

In June, 1972, the New York County District Attorney's Office learned that Joe Martino, Ralph Principie and other unidentified persons were engaging in the acquisition and sale of stolen securities, and that in their illegal business they were using the telephone at a Brooklyn bar called the 1234 Club. The District Attorney of New York County sought an electronic eavesdropping order for the 1234 Club permitting the interception of the conversations of Principie, Martino and their co-conspirators concerning the acquisition and sale of stolen bonds. Justice LARRY VETRANO of

* On December 9, 1974, petitioner was sentenced to concurrent four-to-eight-year terms for the instant convictions. He was subsequently resentenced to concurrent indeterminate seven-year terms after it was determined that the original sentence was not authorized by New York law.

Kings County Supreme Court granted this order. Electronic surviellance began on July 11, 1972. Three days later, during monitoring pursuant to the warrant, it was discovered that petitioner Paul Labriola was a co-conspirator of Martino and Principie and that Labriola was using the telephone at the 1234 Club to engage in the acquisition and sale of stolen securities. Labriola was named as a party whose conversations were authorized to be intercepted in 4 subsequent extensions or renewals of the July 2 order. Conversations intercepted showed that petitioner was actively engaged in this scheme with Martino and Principie. Labriola was arrested on December 5, 1972.

Following the denial of petitioner's motion to suppress evidence obtained pursuant to the electronic eavesdropping warrants, Labriola entered a plea of guilty to two counts of forgery in the first degree, and was sentenced for these crimes.

On appeal to the Appellate Division, Labriola argued, as he does here, that the evidence obtained as a result of the electronic eavesdropping should have been suppressed because the People failed to amend the eavesdropping order to name him "as soon as practicable" after discovering that he was a co-conspirator of the parties named in the order; the warrant of July 27 was not issued upon probable cause; notice of eavesdropping orders was not given within 90 days of the termination of the last order; and the court erroneously denied his motion to reopen the suppression hearing.

THE SUPPRESSION HEARING

The People's Case

June, 1972: Commencement of the Investigation

On June 20, 1972 Leonard Newman, Assistant District Attorney and Chief of the Frauds Bureau in the New York County District Attorney's Office, had a conversation with a confidential informant, later identified as Stanley Reinhardt.* Reinhardt said that on June 15, 1972 he had received a telephone message to call "Paul" at 377-9840. This was the telephone number of a Brooklyn bar called the 1234 Club. "Paul" was a code name for Joe Martino, who had told Mr. Reinhardt that he could only be reached at that number by asking for "Paul," and that if he was not there, to leave a message for "Paul." (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 2-3.)

When Mr. Reinhardt spoke with Martino the next day, Martino said that he had nine United States Postal Bearer Bonds in denominations of $100,000, and that he was selling them for 25% of their face value. Martino gave the serial numbers of four of these bonds, and assured Reinhardt that they "would not be discovered missing until the end of the month." Mr. Reinhardt said he was coming to New York on June 20 and would call Martino at the 1234 Club at 1 p.m. (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 2-3.)

* *See* People's Exhibit 6A (Transcript of June 20, 1972, 8:30 p.m. conversation). This exhibit and the affidavits and other papers hereinafter referred to were part of the record on appeal in the Appellate Division.

On June 20, 1972 Mr. Reinhardt, acting in cooperation with the District Attorney's Office had three telephone conversations with Martino, who was at the 1234 Club. These conversations were recorded with Reinhardt's consent (Peo.'s Exh. 6A). During the first of these conversations, Martino said that the bonds he was offering for sale were four "brand new" Postal Bonds issued February 1 with a maturity date of 1977. The bonds were guaranteed to the end of the month, and there were two other persons interested in buying them. Later that day, during the second conversation, Mr. Reinhardt said he would speak to his "man," who was to buy the bonds, and then call Martino back. (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 3-4.)

During the third conversation of June 20, Martino said that there were other persons interested in buying the bonds and that Reinhardt would have to advance $4000 that night for one of the bonds. However, Mr. Reinhardt refused to advance the money. Also during this conversation, an individual Martino called "Ralph" [later identified as Ralph Principie] was heard in the background instructing Martino not to deliver the bonds to Mr. Reinhardt without receiving the $4000. (*See* Affidavit of Leonard E. Newman in Support of July 5th, 1972 Warrant, at 4.) Paul Labriola was at no time mentioned in these conversations, and, as Mr. Newman testified at the hearing, at that time he "knew of no connection" between Martino and Labriola (Newman: 16-17).*

* Parenthetical numerical references are to the minutes of the suppression hearing unless otherwise indicated.

In investigating the information provided by Mr. Reinhardt, on June 20, 1972, Mr. Newman contacted United States Postal authorities and was told that DuPont, Glore, Forgan, a stock brokerage firm, had received a $100,000 bond with a 1977 maturity date bearing one of the serial numbers supplied to Mr. Reinhardt by Martino. Mr. Newman spoke with an officer of the brokerage firm on June 22 and discovered that the bond bearing the serial number quoted by the Postal authorities was missing. Also missing were 30 other United States Postal Bonds totaling in excess of $1,000,000. These included three other $100,000 bonds bearing serial numbers supplied to Mr. Reinhardt by Martino. (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 5; *accord,* Newman: 5-6). The DuPont, Glore, Forgan officer also told Mr. Newman that, according to firm records, the bonds disappeared on June 12, 1972 and that an audit scheduled to take place at the end of the month would have uncovered this theft. As Mr. Newman observed in the affidavit he submitted in support of the application for an eavesdropping warrant, this information is consistent with Martino's statement to Mr. Reinhardt that the bonds were guaranteed until the end of the month. (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 5.)

On June 25, 1972 Mr. Reinhardt again received a call from Joe Martino, who said that he had one United States Postal Bearer Bond left, that the others were "out," and that he would try to get them back for Reinhardt. Martino said that the bonds had become "hot," and added that he also had a package of industrial bonds worth $175,000 for sale. (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 6.)

The investigation also included observations of the 1234 Club. On June 19th, Detective **Thomas Huller** and another officer went to the Club and knocked on the locked door. They were told by an unidentified individual inside that the Club was "not open to the public," and were refused entry. Further observations that day revealed that "known criminals" and persons with criminal records were entering and leaving the Club. Some of them were followed by police officers involved in this investigation. On the same day, officers observed a car in the area, which they discovered was registered to Paul Labriola, being driven by an unidentified male. Detective Huller did not know whether the driver was Paul Labriola. Observations were also made on June 20 and June 23. The defendant's car was not seen on those days (Huller: 142, 147, 150, 154-57, 169-73, 175, 310, 312, 323, 329, 340; Bocina: 73-74, 78, April 2, 1974 at 16-18; Peo's. Exh. 5).

Having gathered this information, a number of factors led Mr. Newman to conclude that Martino and Principie were not working alone, and that a wiretap would yield evidence about others involved in the scheme, as well as further evidence of Martino's and Principie's guilt. These factors included the "almost * * * private" character of the Club, the fact that Martino and Ralph spoke openly in the Club about the sale of stolen bonds, and Martino's use of the code name "Paul." Martino's request that the informant leave a message for "Paul" if he was not there indicated that others in the Club were aware that he was using the name Paul. From the information furnished to him, including Martino's statement to Mr. Reinhardt that a "package" of Industrial Bonds would become available in the future, Mr. Newman concluded that Martino was

merely a "final passer" and that there was an "inside man" at the brokerage firm who was acquiring the bonds (Newman: 13, 29-41, 46, 51-55, 57-59, 61). Based upon the foregoing information and analysis, Assistant District Attorney Newman decided to apply for a warrant to intercept telephone conversations communicated to and from the 1234 Club.

The First Warrant: July 5th-July 27th

On July 3, 1972 District Attorney Frank S. Hogan applied to Supreme Court Justice LARRY VETRANO for the issuance of an electronic eavesdropping warrant to intercept calls transmitted over the telephone at the 1234 Club. As described above, in the supporting affidavit, Assistant District Attorney Newman related that on June 16, 1972 Martino first offered the Postal Bearer Bonds to the informant. Newman also included in the affidavit a description of the informant's June 20 conversations with Martino and a subsequent conversation of June 25, 1972, during which Martino said he had one Postal Bearer Bond left, but that he had a "package" of Industrial Bonds for sale worth $175,000. Finally, the prosecutor related his conversations with Postal authorities and the brokerage firm of Dupont, Glore, Forgan, and the Police Department's observations of the 1234 Club. (*See* Peo's. Exh. 1, Warrant of July 5, 1972.)

On July 5, 1972 Justice VETRANO signed an order permitting the interception of the telephone communications "of Joe Martino, his coconspirators, agent and associates" concerning the crimes of grand larceny in the second degree, criminal possession of stolen property in the first

degree, and conspiracy to commit these crimes. The interception was to terminate on August 3, 1972. (*See* Peo's. Exh. 1, Warrant of July 5, 1972.)

Pre-Wiretap Minimization Instructions

On July 5, 1972 Sergeant **Rosario Bocina** of the District Attorney's Office Squad instructed the officers who were to monitor the intercepted conversations that they were to listen to the conversations of "Joseph Martino* also known as Paul * * * [a]nd Ralph and their coconspirators." They were to listen for a "reasonable time" to identify the voice or hear someone identify themselves as a person named in the warrant. During this monitoring, if they heard a conversation relating to the crimes under investigation, they were to listen to the conversation because "this might very well be the conversation of a coconspirator." The officers were not to listen to any privileged conversations or to any "social" conversations, and they were not to "go on any fishing expedition" (Bocina: 36, 63-64, 65-72, 75-76, 81, 86; Huller: 160-64, 293-98, 300-303).

Interception Begins: July 11

Although the wiretap was installed on July 6th, interception did not begin until July 11th because the telephone at the 1234 Club was not working (Huller: 167-68). Be-

* Detective Huller and the other officers assigned to monitor the conversations were instructed to listen to the tapes of June 20 between Mr. Reinhardt and Martino to familiarize themselves with the voice of Joe Martino. This conversation had been recorded with the consent of Reinhardt. Detective Huller testified that he did so (Bocina: 38; Huller: 131). Detective Boyle was present when they were recorded. (*See* Peo.'s Exh. 6A.)

tween July 11th and July 14th the monitoring officers heard several conversations between an unidentified individual referred to as "Paul," which concerned the sale and negotiation of stolen bonds. (At the time these conversations were overheard the police had not yet discovered that Paul Labriola was involved in the conspiracy.) For example, on July 11th, a conversation was recorded between "Paul" and Leo, identified as Leon Hunter, which Detective Huller termed a "criminal conversation" about stolen securities. During this conversation, Hunter said he had "the machine" and "Paul" said he had "the pieces." "Pieces" was a term Joe Martino had used in an earlier conversation to refer to the bonds he was offering for sale. (*See* Peo's. Exh. 6a, Transcript of June 20, 1972 conversation, 8:30 p.m.) "Paul" added that although he had "the pieces," he didn't have "the i.d.s.," which Detective Huller testified might have referred to the individuals who would attempt to "pass" the securities (Peo's. Exh. 4A2; Huller: 186-87).

At the same time as these conversations were being monitored, visual surveillance of the 1234 Club continued. On July 6th, Detective Huller observed that one of the cars outside the 1234 Club was registered to Paul Labriola. The detective also observed Labriola, whom the officer was by then able to identify, take something out of the car and go into the Club. The detective was able to identify Labriola because another officer had shown him a picture of the petitioner sometime after June 21. On July 11th, Labriola's car was again seen parked in the vicinity of the 1234 Club (Huller: 168-70, 173; Peo's. Exh. 5).

On July 12, at 4:45 p.m., during the course of interception, Detective Huller overheard a brief conversation be-

tween "Paul," the party at the Club, and "Leon," in which the latter asked Paul to meet him at a luncheonette on Coney Island Avenue. Five minutes later, Paul Labriola left the Club, drove to Coney Island Avenue and went into a luncheonette there. He was observed speaking to an unknown individual. Later that day, Detectives Boyle and Huller discussed the possibility that the individual whose voice they had heard at 4:45 p.m. was Paul Labriola and not Joe "Paul" Martino. However, Detective Huller was not sure that Labriola was the speaker, because Huller had never heard his voice. No conversations covered by the warrant were recorded on July 13 (Huller: 340-43, 345-47; Peo's. Exh. 4A2).

Labriola Is Identified as a Co-conspirator: July 14th-27th

As a result of a conversation intercepted on July 14, the monitoring officers became "positive" that one of the voices they were recording was that of Paul Labriola (Huller: 196). This was a three-way conversation. Joe Martino called from an outside telephone to Ralph Principie and the petitioner, who were in the Club (Peo's. Exh. 4A3; Reel 3311). At the outset of the conversation, Martino asked Principie about "the guy from Canada," apparently referring to informant Stanley Reinhardt. Principie mentioned that Reinhardt was planning to "leave," and then turned the telephone over to Labriola because "he'll know more than me." Martino and the petitioner then talked about whether Labriola could get "those samples" and Labriola attempted to clarify whether he meant the "samples" from "Hayden." Detective Huller interpreted this as a reference to Hayden & Stone, a brokerage firm. Martino said that he meant the "other incident," the "half dollars."

Labriola also mentioned "those 3 things, the big ones" and "those 3 pieces," which Detective Huller interpreted to be a reference to the Postal Bearer Bonds which had been offered to Reinhardt. (*See* Warrant of July 5th, Supporting Affidavit of Leonard Newman) (Huller: 210, 223-26, 263-65).

From this conversation, Detective Huller concluded that Labriola was an "integral part of this conspiracy." He told Sergeant Bocina that Paul Labriola was a party to the July 14th conversation and Bocina relayed this information to Assistant District Attorney Charles Clayman, who had been placed in charge of the investigation. Mr. Clayman said that it was not necessary to amend the warrant to add Labriola's name, and that they could "put it on the renewal" which was "coming in a short time" (Huller: 265-66; Bocina: 50).

As Sergeant Bocina had instructed him, Detective Huller continued to monitor conversations to which Labriola was a party. Additional conversations about the sale and negotiation of stolen bonds were recorded between July 14th and July 27th (Huller: 266-68).*

The Petitioner's Case at the Suppression Hearing

The Second Warrant: July 27th, 1972

Assistant District Attorney **Charles Clayman** testified that he began drafting an eavesdropping order naming Paul Labriola on July "20 or 21st," before the termination

* Recordings of these conversations were submitted to the court below *in camera*. The assistant district attorney at the suppression hearing offered to allow defense counsel to examine the transcripts of these conversations (276-8).

date of the first order on August 3. Mr. Clayman's supporting affidavit was dated July 27, 1972, and signed by Justice VETRANO on that day. It also included a provision for the installation of a "bugging" device, to be operative daily until 7:30 p.m. (Clayman: 361-64, 385-86; *see* Warrant of July 27th, 1972).

Probable cause for the second warrant as to Paul Labriola was demonstrated, in part, by two conversations intercepted during the execution of the first warrant. The affidavit contained the contents of these conversations and an explanation of their meaning by Detective Huller, based on his experience in the investigation of securities frauds. Wtih respect to a conversation of July 21st, 1972 between the petitioner and one "Leon," Detective Huller concluded that Labriola was discussing "stamps used to validate stolen bonds, securities and checks to render them negotiable." (*See* Affidavit of Charles E. Clayman in Support of July 27th Warrant, paragraph 2b). A second conversation to which Labriola was a party pertained, according to Detective Huller, to "the shipment of stolen securities and bonds through the mail and possible acquisition by Paulie of $200,000 dollars worth of stolen securities. * * *" *Id.* at 2(c). Conversations to which "Ralph" and Joe Martino were a party were also intercepted and described. On July 27th, 1972 Justice VETRANO approved the People's application to intercept the telephone conversations of "Joe Martino, Paul Labriola and Ralph, their coconspirators, agents and associates." In addition, Justice VETRANO permitted the installation of a bugging device inside the 1234 Club provided that the interception of conversations not occur

after 7:30 p.m. on any day. Order of Justice VETRANO, July 27th, 1972, at 2.*

The Hearing Court's Decision

At the conclusion of the suppression hearing, the court denied petitioner's motion to suppress evidence obtained as a result of the eavesdropping warrants of July 5th and July 27th. Justice ROBERTS concluded that under *United States* v. *Kahn*, 415 U.S. 143 (1974), officers could intercept Labriola's conversations under the July 5th warrant because petitioner was a co-conspirator and the warrant authorized interception of conversations of co-conspirators. The court rejected Labriola's further contention that as soon as his identity became known, the District Attorney was required to amend the July 5th warrant. The court also found that the petitioner's conversations regarding industrial bonds were covered by the July 5th warrant because the supporting affidavit specifically named industrial bonds, and that, in any event, the order was "unrestricted as to the exact

* The District Attorney applied for a third eavesdropping warrant on September 11, 1972, naming Joe Martino, Paul Labriola, "Ralph," their co-conspirators, agents and associates. That warrant added criminal possession of a dangerous drug in the third degree and conspiracy to commit this crime to the list of crimes about which conversations could be intercepted, and postponed notice under the prior warrants until termination of this third warrant. On September 11, 1972, Justice VETRANO approved the application. On September 26, 1972 a further application was made to intercept the conversations of the same parties at the Say Hi Lounge in Brooklyn, because the 1234 Club had been closed by the State Liquor Authority. (*See* Affidavit of Charles E. Clayman of September 26, 1972, paras. 5-9.) Another order, omitting the drug crime, was issued by Justice VETRANO on September 27, 1972 for the telephone at the Say Hi Lounge. A fifth order was issued by Justice MILTON MOLLEN on October 28, 1972. Paul Labriola was arrested on December 5, 1972 (Bocina: 90).

species of stolen securities." Finally, Justice ROBERTS decided that the monitoring officers were properly instructed concerning minimization and that they "exercised exemplary good faith" in executing the orders. (Appellant's Appendix, at A 70-A 74.)

The Motion to Re-open the Hearing

On March 14, 1972, Labriola moved to reopen the hearing to raise, for the first time, issues with respect to the "bugging" of the 1234 Club authorized under the warrant of July 27th and the purportedly untimely notice of the eavesdropping given to petitioner by the People on December 13, 1972. (*See* Agreed State of Facts of April 7, 1975.)

In an affidavit in support of this motion, defense counsel referred to the decision of Hon. MARK CONSTANTINO in the United States District Court for the Eastern District of New York, where Labriola was also under indictment, on a motion to suppress the same intercepted conversations. In that decision, Judge CONSTANTINO suppressed all conversations overheard after 7:30 p.m. pursuant to the "bugging" order of July 27, 1972. In addition, Judge CONSTANTINO held that no notice was given within 90 days after termination of the eavesdropping orders, but that Labriola was not prejudiced by the delay. (*See* Opinion of Judge CONSTANTINO in *United States* v. *Principie*, 73-CR-972.)

Labriola's motion papers explained why these issues were not raised at the suppression hearing. Counsel's affidavit recited that, upon the defendant's request for the logs prepared pursuant to the bugging order, the prosecutor said that he did not intend to offer as evidence any

conversations obtained as a result of the bugging. Labriola has at no time disputed the prosecutor's representation. In addition, with respect to the issue of statutory notice, counsel stated that he was "not aware" that notice had been untimely because he had "come into the case after the motions had been made by prior counsel," and the defendant's "Original motion papers" did not contest the timeliness of the notice. (*See* Supporting Affidavit of Robert I. Weisswasser). On March 14, 1975, the court denied the motion in all respects as being "not timely." Minutes of March 14, at 2.

On May 14, 1975 the District Attorney consented to reopening the hearing only on the issue of whether notice of the eavesdropping order was timely. The court found that notice was properly given within 90 days of the termination of the September 11 warrant, pursuant to Criminal Procedure Law Section 700.50.

ARGUMENT

This petition raises four questions: (1) Did the warrant authorize interception of petitioner's conversation even though he was not named in the warrant and did the People have to add petitioner's name to the warrant immediately after discovering that petitioner was a co-conspirator of persons whose conversations were authorized to be intercepted; (2) Was there probable cause to issue the July 27th warrant; (3) Was notice of the eavesdropping timely; and (4) Did the hearing court erroneously deny petitioner's motion to reopen the hearing to challenge whether electronic surveillance had been conducted beyond the 7:30 p.m. limit provided for in the warrant.

1. The July 5th eavesdropping warrant authorized interception of the conversations of Paul Labriola therefore it was unnecessary to amend that warrant.

New York Criminal Procedure Law section 700.65 (subd. 4) provides that when in the course of properly executing an eavesdropping warrant, the police overhear conversations the interception of which was not authorized by the warrant, then those conversations may not be introduced in evidence unless an amendment of the warrant is obtained as soon as practicable (*accord,* 18 U.S.C. §2517[5]).* Petitioner contends that since the warrant did not authorize interception of his conversations, the conversations intercepted were inadmissible because no amendment was ever obtained.

However, the warrant did in fact authorize the interception of petitioner's conversations. The July 5th warrant authorized interception of the conversations of "Joe Martino, his co-conspirators, agents and associates and 'Ralph' * * *" about the "procurement and disposition of stolen securities" relating to conspiracy to commit the crimes of grand larceny and criminal possession of stolen property.

That Labriola was a "co-conspirator" was amply demonstrated by the "three-way" conversation intercepted on July 14th between Ralph Principie, Joe Martino and Paul Labriola. This conversation demonstrated Labriola's in-

* New York Criminal Procedure Law section 700.65 (subd. 4) is virtually identical to 18 U.S.C. 2517(5). Title 18, section 2516(2) of the United States Code authorizes state legislatures to pass statutes governing electronic surveillance, but only if that legislation provides, at a minimum, the safeguards contained in the federal statute. Consequently, failure to comply with a state statute which provides the minimum protection required by the federal statute, would raise a federal question which could be reviewed by this Court.

volvement in the very criminal transaction which served as the basis for the warrant.

Moreover, the intercepted conversations of Labriola concerned the shipment of stolen securities and bonds through the mail, and the future acquisition by Labriola of additional stolen securities. Thus, these conversations refer to the sale and negotiation of stolen securities, the specific pattern of criminal activity covered by the warrant. True, these conversations may have concerned different transactions than the original transactions under investigation. But, the intercepted conversations were of the same type and nature as those specified in the warrant; and it is well settled that no greater specificity is required. *See United States* v. *Tortorello,* 480 F.2d 764, 780 [2d Cir. 1973], *cert. denied,* 414 U.S. 866 [1973]; *United States* v. *Armocida,* 515 F.2d 29, 37 [3d Cir. 1975], *cert. denied,* —— U.S. ——.*

Thus, there is no doubt that Labriola's conversations were authorized to be intercepted. Consequently no amendment was required. *United States* v. *Principie,* 531 F.2d at 1137-38, *supra; United States* v. *O'Neill,* 497 F.2d 1020, 1023 [6th Cir. 1974]; *People* v. *Gnozzo,* 31 N.Y.2d 134, 142 [1972], *cert. denied* 410 U.S. 943 [1973]. The only requirement that had to be met was that petitioner be named in the application and the warrant if he was "known" to be a co-conspirator (N.Y.Crim. Proc. Law §§700.20[2][b][iv], 700.30[4]; 18 U.S.C. §§2518[1][b][iv], [4][a]; *see United States* v. *Kahn,* 415 U.S. 143 [1974]). t is undisputed that at the time of the first application petitioner was not known to be a co-conspirator. After his participation as a co-conspirator became known, he was named in the subsequent

* Certiorari was denied with respect to a co-defendant, —— U.S. ——, 96 S.Ct. 111 (1975), but it is unclear whether the specificity issue was raised.

warrants, as required by statute. There is no statutory requirement, nor does petitioner cite any case which requires, that if the identity of a co-conspirator is discovered during the course of interception, then the order which authorized that interception must be changed immediately to include the name of the newly discovered co-conspirator.

Petitioner cites no division either among the circuits or state courts about the standard by which to determine whether intercepted conversations are within those authorized to be seized and when an amendment is required. The Second Circuit has held that the warrant in this case authorized interception of petitioner's conversations. *United States* v. *Principie,* 531 F.2d at 1137-38. Consequently, the petition presents no substantial constitutional question for this Court's review.

2. The July 27 warrant was issued upon probable cause.

Petitioner next contends that the July 27th warrant was not supported by probable cause to believe that interception of the conversations of Paul Labriola "would yield material evidence of * * * Grand Larceny in the Second Degree, Criminal possession of stolen property in the First Degree and conspiracy * * * pertaining to the disposition and acquisition of stolen securities and bonds."

Petitioner's conversations which were set forth in the affidavit in support of the July 27th warrant clearly established probable cause. For example, petitioner referred to "that little stamp," which he acknowledged had a "date" and that petitioner had "the blank," for which he was looking for someone to "type * * * up" (Affidavit of Charles Clayman of July 27 at 4-5). In the expert opin-

ion of Detective Huller, which was also part of that affidavit, the "stamp" with a date referred to an instrument for the validation of stolen securities, and petitioner's further statement, "something real big in the broke," referred to the theft of securities from a brokerage firm.

The interpretations of petitioner's conversations and the conversations themselves prompted both the Appellate Division, in affirming without opinion, and the Second Circuit more explicitly, 531 F.2d at 1138-1139, to hold that there was probable cause to issue the July 27th order. Ten judges in the federal and state appellate and trial process have found that the July 27th warrant was supported by probable cause. Given these decisions and the narrow probable cause question presented, the issue is not one which merits further review by this Court.

3. Defendant received timely notice of the eavesdropping orders.

In the course of this investigation, five eavesdropping orders were obtained. The first of these was dated July 3, 1972. The second order, entitled an order renewing and amending, was dated July 27, 1972. The second eavesdropping order expired on September 2, 1972. A third order was issued on September 11, 1972, and was to expire on October 10, 1972. However, this third order was renewed and amended on September 27th to cover a different telephone because the conspirators had moved their base of operation. This September 27th authorization was renewed once on October 28th, and expired on November 26th. Petitioner was served with notice of the eavesdropping on December 13, 1972.

Both New York and federal law require notice with 90 days of termination of an order or an extension of that order (N.Y. Crim. Proc. Law §700.50[3]; 18 U.S.C. §2518 [8][d]). Petitioner contends that, with respect to the first and second orders, the notice he received was not timely. Therefore, he says, his conversations overheard pursuant to these orders should have been suppressed.

Petitioner is correct in his assertion that he received notice more than 90 days after expiration of the second order. But, the ninety-day notice period is subject to two exceptions, both of which are applicable here. Section 700.50 (subd. 4) of New York's Criminal Procedure Law authorizes the issuing judge, upon a showing of exigent circumstances, to postpone notice for a reasonable time. Petitioner does not challenge this provision. In the September 11th (third) order, the issuing judge postponed notice of the first and second orders until termination of the third order.* That third order was renewed and amended on September 27, 1972. That renewal expired on or about October 27th. Even assuming that the September 11th (third) order terminated on the 27th of September, the December 13, 1972 notice was given 77 days after termination, within the ninety-day requirement. Based upon the order postponing notice, the hearing court (Roberts, J.) denied the motion to suppress and held the notice timely.

The second reason for holding the notice timely was given by the Second Circuit in its opinion reviewing petitioner's federal conviction. (531 F.2d at 1142-43). De-

* Petitioner does not contend there was an insufficient factual showing to postpone notice.

spite the nine-day hiatus between the second and third orders, the Second Circuit held that the third order was in fact an extension of the second order. That court reasoned that the intention of the statute in postponing notice until after expiration of extensions was to defer notice until completion of an investigation. The nine-day lapse between the second and third orders could not change the fact that there was still only one investigation. Consequently, according to the Second Circuit, time for computing notice was to be measured from November 26, 1972, and the December 13th notice was timely.

Finally, petitioner fails to allege that he was prejudiced by the allegedly untimely notice. If the notice was not timely, then there would be a question whether suppression would be the proper remedy in the absence of prejudice to the petitioner.* However, since the notice was timely, that question is not presented here.

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* This Court has recently granted certiorari in one case where it was held, *inter alia*, that, despite the absence of prejudice to a defendant, the failure to comply strictly with the notice provision required suppression of intercepted conversations. (*United States* v. *Donovan*, 513 F.2d 337, 343-44 [6th Cir. 1975], *cert. granted* —— U.S. ——, 96 S.Ct. 1100 [1976]. Certiorari has also been sought in a second case involving, *inter alia*, the failure to give notice timely: *United States* v. *Bernstein*, 509 F.2d 996, 1004 [4th Cir. 1975] [pet. filed 5/27/75].) Other circuits have held that if the purposes of notice are fulfilled and the defendant suffers no prejudice, strict compliance with the notice provision is unnecessary (*see, e.g., United States* v. *Bohn*, 508 F.2d 1145 [8th Cir. 1975], *cert. denied* 421 U.S. 947 [1975]; *United States* v. *Rizzo*, 492 F.2d 443, 447 [2d Cir. 1974], *cert. denied* 417 U.S. 944 [1974]; *United States* v. *Iannelli*, 477 F.2d 999, 1003 [3d Cir. 1973], *aff'd* 420 U.S. 770 [1975]).

4. The court's denial of the untimely motion to re-open the suppression hearing rests upon an adequate state procedural ground.

The second eavesdropping order, dated July 27, 1972, authorized installation of a "bugging" device inside the 1234 Club, and permitted the interception of conversations inside the club every day until 7:30 p.m. At the suppression hearing, petitioner raised no issue with respect to the bugging. However, on March 14, 1975, subsequent to his plea of guilty and the imposition of sentence, petitioner moved to reopen the hearing to introduce logs of the bugged conversations, which he claimed indicate "continuous bugging after 7:30 p.m." in violation of the July 27th eavesdropping order.* In motion papers, petitioner explained that this issue had not been raised at the hearing because the prosecutor informed defense counsel that he did not intend to offer as evidence any conversations obtained as a result of the bugging. The court denied Labriola's motion to reopen the suppression hearing and refused to consider the merits of his contention because the motion was "not timely made."

New York State Criminal Procedure Law section 710.70 [subd. 3], provides that a defendant who does not move to suppress evidence obtained as a result of eaves-

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* The petitioner appended to his motion a decision by the Hon. Mark Constantino, Judge of the United States District Court for the Eastern District of New York, on the legality of the same wiretap orders in connection with another indictment pending against defendant in that court. Judge Constantino suppressed all conversations obtained in violation of the 7:30 limitation but refused to suppress other conversations lawfully seized under the eavesdropping warrants. *United States* v. *Principie*, 531 F.2d at 1139. The United States Court of Appeals for the Second Circuit did not disturb this holding. *Id.* at 1139-41.

dropping "before or in the course of a criminal action waives his right to judicial determination of any such contention." A criminal action is deemed terminated upon imposition of sentence (N.Y. Crim. Proc. Law §1.20 [16]). The hearing court concluded that the motion made after defendant had been sentenced, was "not timely made," and refused to reopen the hearing. The New York statutory scheme like the federal provision (Fed. R. Crim. P. 12 [f], and other state statutes, is designed to bring finality to litigation and to insulate convictions from challenge at a time when reprosecution would be difficult if the challenge were successful. The validity of the state interest in this regard has been recognized by this Court (*see e.g., Francis* v. *Henderson,* —— U.S. ——, 96 S. Ct. 1708 [1976]; *see also Davis* v. *United States,* 411 U.S. 233 [1973]). Thus, the denial of petitioner's motion rests upon an adequate state ground thereby precluding review by this Court (*see Henry* v. *Mississippi,* 379 U.S. 443, 446 [1965], *reh. denied,* 380 U.S. 926 [1965]; *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 [1945]).

In any event, even assuming that the hearing court had granted the motion to reopen and found that conversations had been intercepted beyond the 7:30 limitation, petitioner's contention that all conversations, including those lawfully intercepted, clearly lacks merit. The proper remedy is the suppression of only those conversations unlawfully intercepted. *See People* v. *Gnozzo,* 31 NY2d 134, 141 (1972); *United States* v. *Cox,* 462 F.2d 1293 (8th Cir. 1972), *cert. denied,* 417 U.S. 918 (1974), *reh. denied,* 419 U.S. 885 (1974); *United States* v. *Scott,* 516 F.2d 751, 760 fn. 19 (D.C. Cir. 1975) (dictum); *United States* v. *LaGorga,* 336 F. Supp. 190, 197 (W.D. Pa. 1971); *United States* v. *Mai-*

nello, 345 F. Supp. 863, 875-7 (E.D. N.Y. 1972); *United States* v. *Leta,* 332 F.Supp. 1357, 1360 (M.D. Pa. 1971); *United States* v. *King,* 335 F. Supp. 523, 543-4 (S.D. Cal. 1971), *rev'd on other grounds,* 478 F. 2d 494 (9th Cir. 1973), *cert. denied,* 417 U.S. 920 (1974); *United States* v. *Tortorello,* 480 F. 2d 764, 775 (2d Cir. 1973).

To the extent that there is any controversy about this remedy (*compare* cases cited in preceding paragraph *with United States* v. *Focarile,* 340 F. Supp. 1033, 1046-7 [D. Md. 1972], *aff'd on other grounds* 469 F.2d 522 [4th Cir. 1972], *aff'd* 416 U.S. 505 [1974]), this case is not representative of the way in which the issue usually arises. Thus, this is not a good case in which to resolve that controversy. As the Second Circuit noted:

[8] Whatever view we may take of this controversy in the abstract, we note that this case is somewhat different from those discussed above. The police in this case violated not the general, statutorily-required injunction to minimize interception of innocent conversations, but rather a specific aspect of the order prohibiting interception of *any* conversations after 7:30 P.M. This significantly alters the considerations on each side. The Government cannot make the argument that the police were trying in good faith to make delicate judgments about which calls were innocent and which incriminating; the violation of the order was by its nature blatant and apparently extensive as well. On the other hand, the most persuasive argument favoring across-the-board suppression does not apply in this case—the district judge here suppressed evidence that could be useful to the Government as well as conversations that were innocent. To that extent, the suppression already ordered should have a deterrent effect. Moreover, we are less inclined to use the drastic rem-

> edy of suppressing conversations that were themselves seized legally because other conversations were seized in violation of a minimization order, where the minimization order in question is a limited one whose purpose has never been made clear to us, than we might be in the case of the usual minimization order, which embodies a statutory requirement central to the policy of Title III. In the unique circumstances of this case, we conclude that only those conversations which were seized in violation of the time limitation in the order had to be suppressed. *United States* v. *Principie*, 531 F.2d at 1140-41, *supra*.

As demonstrated above, even if petitioner could obtain review of the denial to reopen the suppression hearing, there is presented no substantial and significant constitutional question. More importantly, this Court has no jurisdiction to review the hearing court's refusal to reopen the hearing because it was based upon a state statute and not the Constitution or any federal statute.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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